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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN, Petitioner

vs.

**RAYMOND CLIFFORD, and
EMMA JEAN CLIFFORD, Respondents**

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW CORRECTLY RULED THAT A WARRANTLESS SEARCH OF THE RESPONDENTS' HOME VIOLATED THE FOURTH AMENDMENT BASED ON A FINDING THAT THERE WAS AMPLE TIME TO OBTAIN A WARRANT AFTER THE FIRE WAS EXTINGUISHED AND THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING AN IMMEDIATE SEARCH WITHOUT A WARRANT?

II.

WHETHER THE EXCLUSIONARY RULE WAS PROPERLY APPLIED BY THE LOWER COURT BASED ON ITS FINDING THAT THE ARSON SQUAD'S POLICY CONTRADICTS THE **MICHIGAN V TYLER** HOLDING IN THAT IT SANCTIONS WARRANTLESS SEARCHES BY INVESTIGATORS WITHOUT FIRST DETERMINING THAT THE FACTS IN A GIVEN CASE FALL WITHIN AN EXCEPTION TO THE WARRANT REQUIREMENT, SUCH AS ABANDONMENT OR EXIGENT CIRCUMSTANCES?

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STATEMENT OF FACTS

On October 18, 1980, at about 5:42 a.m. a fire broke out at the home of Raymond and Emma Clifford in the City of Detroit. The Clifford family was out of town at the time of the fire.

The fire in the Clifford home was first reported at 5:42 a.m. and the first fire units responding to the scene arrived within two to three minutes of the alarm. (7)* By 7:04 a.m. the fire was completely under control and all police and fire units had departed from the scene.(8)

Later in the morning of that same day, Lt. John Beyer from the Police/Fire Arson Squad received a written request to investigate the fire at the Clifford home. This request, initiated by the firefighters at the scene, indicated "probable arson." (6, 9, 15)

Upon receipt of this request, Lt. Beyer processed a prisoner, investigated another fire, and stopped for a brief lunch before finally proceeding to the Clifford residence. He arrived at the scene at approximately 1:00 p.m. — fully six hours after the fire had been extinguished. (7)

Upon arrival, Lt. Beyer observed the home being boarded up (presumably by insurance agents of the Cliffords) and a man in the basement in the process of pumping out water estimated at a depth of from six inches to one foot. (7, 10) Lt. Beyer then talked to some neighbors about the whereabouts of the owners; and was informed that the Cliffords were out of town. (8)

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* Numbers in parenthesis refer to transcript page numbers.

Within one-half hour of his arrival, Lt. Beyer and other members of the Arson Squad entered the premises and conducted a search (20). The search was conducted without a warrant and without anyone's consent.

According to Lt. Beyer, he entered the Clifford home without a warrant based on the Arson Squad's policy that its investigators can enter when a dwelling is open for trespass (9). Lt. Beyer testified that he would not have entered the premises if: (a) they had been secured, or (b) the owner of the premises had been present. According to Lt. Beyer, if a house is not secured it is open for trespass and anyone can enter (17).

Lt. Beyer acknowledged that although the home was being boarded up at the time, he made no attempt to ask the workers at the house for permission to enter and search (10, 18). Lt. Beyer also acknowledged that it would have taken him about an hour to obtain an administrative warrant authorizing the search (22).

REASONS FOR DENYING THE WRIT

I.

THE COURT BELOW CORRECTLY RULED THAT A WARRANTLESS SEARCH OF THE RESPONDENTS' HOME VIOLATED THE FOURTH AMENDMENT BASED ON A FINDING THAT THERE WAS AMPLE TIME TO OBTAIN A WARRANT AFTER THE FIRE WAS EXTINGUISHED AND THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING AN IMMEDIATE SEARCH WITHOUT A WARRANT.

In **Michigan v Tyler,** 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), this Court held that a reasonable expectation of privacy continues to exist in a burned dwelling and police and fire investigators must therefore obtain a warrant before entry unless the search falls within one of the recognized exceptions to the warrant requirement.

However, on the facts presented in**Tyler** this Court held that no warrant was required because the same firefighters who had fought the blaze were merely continuing their investigation into the origins of the fire when they returned in the daylight hours after the smoke and steam had dissipated. This holding was based on the fact that firefighters are charged with the duty of determining a fire's origin and, once in a building for this purpose, firefighters may also seize evidence of arson that is in plain view. **Michigan v Tyler,** 436 US at 509.

The Petitioner in the instant case accordingly asserts that no warrant was required here because, as in **Tyler,** the search should be viewed as nothing but a continuation of the original entry by firefighters. This assertion is clearly misplaced. Unlike the facts presented in **Tyler,** this case does not involve a return to the scene by the same firefighters who fought the blaze. To the contrary, the firefighters here had left the scene with no intention of returning and had referred the matter to criminal investigators with a notation of probable arson.

This situation is therefore clearly distinguishable from the facts presented in **Michigan v Tyler, supra.** Instead of a continuation of the original firefighting activities, this case involves a search for criminal evidence by criminal investigators. The warrantless search by these investigators was therefore clearly detached from the firefighting activities and was undertaken for an entirely different purpose.

In short, this case does not involve a delayed investigation by firefighters into the possible origins of the blaze in order to prevent a recurrence. The search here was of an entirely different character. It was undertaken by a trained arson investigator in order to gather evidence of a crime with a view towards possible prosecution. Moreover, the owners' reasonable expectation of privacy in their partially burned dwelling is reinforced by the fact that it was being boarded up to prevent trespass at the very time of the search. These facts bring this case squarely within this Court's holding in **Michigan v Tyler,** 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978).

II

THE EXCLUSIONARY RULE WAS PROPERLY APPLIED BY THE LOWER COURT BASED ON ITS FINDING THAT THE ARSON SQUAD'S POLICY CONTRADICTS THE **MICHIGAN V TYLER** HOLDING IN THAT IT SANCTIONS WARRANTLESS SEARCHES BY INVESTIGATORS WITHOUT FIRST DETERMINING THAT THE FACTS IN A GIVEN CASE FALL WITHIN AN EXCEPTION OF THE WARRANT REQUIREMENT, SUCH AS ABANDONMENT OR EXIGENT CIRCUMSTANCES.

Petitioner argues that the Exclusionary Rule should not be applied here because the police conduct, even if viewed as improper, was undertaken in good faith and was not a "but for" cause for the discovery of the items seized. Petitioner relies in this regard on the case of **United States v Jarvis,** 560 F 2d 494 (CA 2, 1977). That case is clearly distinguishable as to both facts and law.

The evidence in the **Jarvis** case consisted of the defendant's photograph and palm prints. Since Jarvis conceded that the government had probable cause to arrest him, the sole issue was whether it was permissible to arrest Jarvis in his home at mid-day, following a forceable entry, without a valid warrant particularly describing Jarvis. The Court declined to suppress under these circumstances because the agents were acting in good faith in making the arrest and had probable cause to arrest Jarvis and therefore obtain the evidence had he been arrested anywhere

but outside his home. Since the agents had independent probable cause to arrest Jarvis, the seizure of his photographs and palm prints was not a "but for" cause for the introduction of evidence sought to be suppressed. **United States v Jarvis,** 560 F 2d 494, 498 (CA 2, 1977).

Unlike the situation in **Jarvis,** the evidence here was of a different nature, and was obtained directly from the illegal search and seizure. Moreover, it could have not been otherwise obtained except through a valid warrant based on probable cause. **Michigan v Tyler,** 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978).

Finally, the search here was not a good faith mistake of the kind presented in **United States v Jarvis, supra.** At the time the **Jarvis** case was decided, this Court had expressly left open the question of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." **United States v Watson,** 423 US 411, 418, n. 6, 46 L Ed 2d 598, 96 S Ct 820 (1976). This good faith mistake in the **Jarvis** case contrasts sharply with the unconstitutional policy presented here that sanctioned warrantless searches by investigators without first determining whether the facts in a given case fell within an exception to the warrant requirement, such as abandonment or exigent circumstances. The Michigan Court of Appeals therefore properly suppressed the fruits of a clearly illegal search and seizure.

CONCLUSION

It is respectfully submitted that the decision of the Michigan Court of Appeals is consistent with settled law and does not present any issue of significance deserving of review by this Honorable Court.

Respectfully submitted,

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